Case No. 83-6

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CARROLL D. BESADNY, ET AL.,
Appellants,

v.

LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, ET AL.,
Respondents.

STATE OF WISCONSIN, a sovereign state, and SAWYER COUNTY, WISCONSIN,
Appellants,

v.

UNITED STATES OF AMERICA,
Respondent.

ON APPEAL FROM THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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I. The Motion To Dismiss Should Be Denied.

The appellees, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al. (hereafter, "the tribe" or "the LCO Band"), seek dismissal of this appeal on the grounds that the Seventh Circuit Court of Appeals did not declare a Wisconsin statute invalid, and that the decision below is not final. Neither assertion has merit.

Although the Seventh Circuit Court of Appeals spoke in terms of the existence or nonexistence of treaty rights, rather than the validity or invalidity of Wisconsin Statutes, the effect of its judgment is to hold sec. 29.09(1), Wis. Stats., invalid.[1]/ That statute prohibits hunting, trapping, or fishing without a license, restricts the issuance, transfer, and possession of licenses, and concludes: "Indians hunting, fishing or trapping off Indian reservation lands are subject to this chapter." We ask this Court to take judicial notice that "this chapter" — ch. 29, Wis. Stats. (1981-1982) — is titled "Fish and Game" and regulates hunting, fishing, trapping, and gathering throughout Wisconsin, by means of 131 separate laws.

The LCO Band specifically sought a judgment declaring sec. 29.09(1), Wis. Stats. (1971), unconstitutional (Amended Complaint, A-Ap. 191). The Seventh Circuit's declaration of continuing rights to hunt, fish, and gather throughout the lands ceded in 1837 and 1842 necessarily invalidates sec. 29.09(1), Wis. Stats., by virtue of this Court's most basic holdings on state regulation of treaty hunting and fishing rights. The license requirement in sec. 29.09(1), Wis. Stats., is invalid as to Chippewa, under *Tulee v. State of Washington*, 315 U.S. 681 (1942). In *Washington v. Washington State Commercial Passenger Fishing Vessel Asso.*, 443 U.S. 658, 681-82, n. 25 (1979) (hereafter, "*Fishing Vessel*"), this Court distinguished the State's usual police power from its power over hunting and fishing by Indians. Applying those statements to the present case, the LCO Band is now guaranteed "more than simply the 'equal opportunity' along with all of the citizens of the State to catch fish. ..." Section 29.09(1), Wis. Stats., purports to give Indians only an "equal opportunity" to harvest the State's natural resources. Although ch. 29, Wis. Stats., may subject nontreaty fishermen "to

[1]/Section 29.09(1), Wis. Stats., is printed in full at page 182a of the Jurisdictional Statement Appendix (hereinafter, "A-Ap. ") of the appellants (hereinafter, "the State").

any reasonable state fishing regulation serving any legitimate purpose, treaty fishermen are immune from all regulation save that required for conservation." 443 U.S. at 682. The court of appeals did not have to declare sec. 29.09(1), Wis. Stats., invalid in so many words; full or partial invalidity necessarily follows from holdings described in *Fishing Vessel.*

By contrast, in *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), this Court doubted there was a real holding of invalidity, because the trial court considered the merits of the case only to grant preliminary injunctive relief, before trial of the merits. The procedural facts of *Dusch v. Davis*, 387 U.S. 112 (1967), are closer to this case, although the decision does not expressly address appealability. The plaintiff attacked a state law as unconstitutional, and the district court upheld the law. The court of appeals' reversal of the district court judgment *in effect* held the statute unconstitutional, and this Court proceeded to the merits under 28 U.S.C. sec. 1254(2).

The requirement of a "final" judgment, if there is such a requirement,[2]/ serves the same basic purposes as the requirement of a reasoned, on-the-merits declaration of invalidity: it avoids premature and piecemeal appeals. This Court has often pointed out that "a decision 'final' within the meaning of [the predecessor of sec. 1254(2)] does not necessarily mean the last order possible to be made in a case." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964).[3]/ Because the definition of "finality" is often difficult, "the requirement of finality is to be given a 'practical rather than a technical construction.'" The "'inconvenience and costs of piecemeal

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[2]/In *El Paso v. Simmons*, 379 U.S. 497, 502 (1965), this Court stated that it had "questioned but never put to rest" authority indicating that sec. 1254(2) is available only for review of a final judgment.

[3]/As noted by the tribe, Motion to Dismiss, n. 1, much of the applicable precedent on the definition of "finality" involves writs of certiorari, since the same considerations arise in both types of cases.

review'" are to be balanced against "'the danger of denying justice by delay.'" *Id.*, at 152-53. This Court will review lower court rulings in a case not yet fully tried, where the ruling is "'fundamental to the further conduct of the case.'" *Id.*, at 153.

There would be *no* "further conduct" of this case, if this Court were to reverse the court of appeals on the "fundamental" issue of the existence of the disputed treaty rights. If the State is entitled to such a reversal, it would be substantially injured by delaying that ruling until after full trial of the reasonableness and necessity of all the State's hunting and fishing laws, as applied to hundreds of species of fish, game, and plants, in an area of about 15 million square miles. The certiorari cases cited at page 2 of the State's Jurisdictional Statement strongly support a holding that "finality" is no bar to present consideration of this appeal.

II. The Motion To Affirm Should Be Denied.

A. The Seventh Circuit's construction of the relevant treaties conflicts with decisions of this Court.

The LCO Band argues, in support of its Motion to Affirm, that the Seventh Circuit correctly applied settled rules for construction of Indian treaties. In response, the State relies primarily on the arguments stated at pages 9-15 of its Jurisdictional Statement. This Court's decisions have tempered a consistent respect for the understanding of the Indian parties, with equal respect for the separation of powers between the judicial and legislative branches of government. Federal courts are authorized to declare the meaning of treaties, but must leave to the legislative branch the rewriting of unfair or improvident terms. *United States v. Choctaw Nation*, 179 U.S. 494, 532 (1900); *DeCoteau v. District County Court for Tenth Jud. Dist.*, 420 U.S. 425, 449 (1975). When this Court has failed to specify that *ambiguous* or *technical* terms in a treaty must be construed as the Indians would have understood

them, it has achieved the same result by cautioning that the clear meaning of a treaty cannot be ignored, to remedy what the court considers injustice or improvidence. By either method, this Court has sought to carry out the Indians' *reasonable* understanding of a treaty.

The tribe asserts that the Seventh Circuit "utilized all the appropriate rules of construction." The court of appeals acknowledged various aids to construction,[4]/ but analyzed the evidence from the single standpoint of "the Indians' understanding." The court of appeals also borrowed at length from the district court's meticulous statement of the massive body of evidence in this case. 700 F.2d at 344-49. That does not change the overall effect of the court's analysis, which is to hold that legislation affecting Indians shall be interpreted as the Indian parties understood them, period.

B. The court of appeals violated this Court's clear standards for review of a summary judgment.

These consolidated cases were presented to the court of appeals from rulings on cross-motions for summary judgment. To apply the rules for summary judgment review correctly, the case must be viewed as three distinct rulings, two of which favored the tribe in the district court, and one which favored the state.

The district court ruled *against* the State on the meaning of the conditional use and occupancy clauses in the 1837 and 1842 Treaties, and on the legal effect of the 1850 removal order. The court ruled in favor of the State on the ultimate issue of relinquishment of the off-reservation use rights in the 1854 Treaty.

The Seventh Circuit's misapplication of the summary judgment review standard facilitates its later errors on the effect of the 1854 Treaty. The tribe's assertion of the

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[4]/*Lac Courte Oreilles Band, etc. v. Voigt* (hereinafter, *"LCO Band"*), 700 F.2d 341, 351 (7th Cir. 1983).

standard for appellate review of a summary judgment (Motion to Affirm, page 8) is incomplete. The prevailing party must also establish that it is entitled to judgment as a matter of law. The state agrees that there is no genuine issue of material fact, but disputes the lower court's *legal* conclusions that: (1) the parties to the 1837 and 1842 Treaties intended to authorize removal only for cause, and for only two causes — "serious" misbehavior or expiration of a long time; and (2) the "misbehavior" documented in the record (*United States v. Bouchard*, 464 F. Supp. 1316, 1324-26 (W.D. Wis. 1978); A-Ap. 62a-66a) was not "serious." The factual inferences underlying those conclusions of law are obviously critical, especially where the record is voluminous and conflicting.

The state argued numerous inferences from the evidence recited in *Bouchard: (Bouchard*, at 1322-32, A-Ap. 56a-80a) that the legislative history of the two earlier treaties demonstrated unmistakable government intent to secure title to the Wisconsin Indian lands and to remove the Indians westward at such time as it was desirable, for *any* reason; that the 1837 Treaty Journal (*Bouchard*, at 1322-23, A-Ap. 57a-59a) revealed Chippewa determination to secure their tenure in Wisconsin for a period of years or on certain conditions, and persistent explanations by Commissioner Dodge that the government insisted on unconditional title to the lands; and that the variety of reasons urged by government officials and the Minnesota Legislature in support of removal (*Bouchard*, at 1325-26, A-Ap. 63a-66a) demonstrates *absolute* ignorance that the government had limited itself in 1837 and 1842 to removal only for "serious misbehavior" or after a term of years.

On the issue of "serious" misbehavior, the court of appeals totally ignored the State's reasonable theory that one purpose of the government's removal/isolation policy was to avoid *all* types of white-Indian conflict, whether brought about by illegal liquor, misunderstanding, or by the "fault" of the Chippewa. The court also

rejected argument from the record that the exemplary behavior of the bands residing on Lake Superior was *not* matched by the interior Lake Superior bands or by the Chippewa of the Mississippi.

C. *The court of appeals' analysis of the 1850 executive order conflicts with decisions of this Court.*

The tribe's arguments concerning the 1850 removal order (Motion to Affirm, part C) do not directly address the arguments on that subject in Part II of the State's Jurisdictional Statement, except to assert that no substantial matters are presented (Motion, page 9). The State disagrees, and comments additionally on the following points: At page 9, the Motion refers to "express representations" that removal would occur only for misbehavior. The *Bouchard* description of the 1837 (*Bouchard*, at 1322-23, A-Ap. 57a-60a) and 1842 negotiations[5]/ reveals that the evidence is anything but definitive on the subject of the representations, if any, made by the treaty commissioners, either as to reasons for, or likelihood of, removal. Also at page 9, the tribe describes the State as challenging the rules used to analyze "an Executive Order issued outside the scope of authorization contained in the treaties." A major dispute in this case is *whether* the 1850 order was outside the authorization of the earlier treaties.

The district court addressed the arguments reintroduced by the LCO Band at pages 10-12 of the Motion to Affirm. *See Bouchard*, at 1350-51, n. 17, A-Ap. 121a-123a. In addition to that reasoning of the district court, the State points out that the removal order *was* carried out, to the extent that some 3,000 out of 5,000 Chippewa (*Bouchard*, at 1326, n. 6, A-Ap. 67a) were removed to Minnesota (*Id.*, at 1329, A-Ap. 72a-74a).

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[5]/ *Bouchard*, at 1324, Commissioner Stuart was instructed that general removal from the area would not take place for a "considerable time"; and page 1327, June 30, 1850 letter of Chief Hole-in-the-Day, and January 21, 1851 letter by the Secretary of the American Board of Commissioners for Foreign Missions, A-Ap. 60a-62a, 67a-69a.

The tribe's arguments (Motion to Affirm, pages 12-13) concerning the *res judicata* effect of *Mole Lake Band, et al. v. United States*[6]/ have been addressed in Part IV of the State's Jurisdictional Statement. The State reiterates that Wisconsin was invited to be, and was, a full party to the *Mole Lake* proceedings.

D. The Seventh Circuit analysis of the nature of the treaty rights at issue, and the requisites for abrogating them, conflicts directly with decisions of this Court.

The Seventh Circuit's errors on this subject are the most grievous of those presented.[7] The tribe asserts that this Court has always refused to abrogate treaty-reserved rights of use by implication. This Court has repeatedly stated, even in cases involving "permanent" reservations established by treaty, that rights reserved by treaty can be abrogated by express language, *or* upon a "clear showing of intent" (presumably less than express statement), *or* that abrogation will not be "lightly implied" (indicating, inescapably, that some other kind of implied abrogation *is* permissible). *See* Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation*, 63 Cal. L.R. 601, 623-24 (1975); *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586-87 (1977). Whether a single case of implied abrogation of treaty-reserved use rights can be found, is less significant than this Court's repeated

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[6]/139 F. Supp. 938, 134 Ct. Cl. 478 (1956), *cert. denied*, 352 U.S. 892 (1956), hereafter, *"Mole Lake."*

[7]/It must also be remembered that reversal of the court of appeals on the underlying issues — meaning of the conditional use and occupancy clauses and validity of the 1850 removal order — would moot this last issue. If the 1850 Order was valid, it revoked all of the conditional rights the Chippewa possessed under the earlier treaties. *Bouchard*, at 1350-51 n. 17, A-Ap. 121a-123a. Implied abrogation of the 1837 and 1842 rights of the 1854 Treaty would be superfluous, in light of the very *express* abrogation in the 1850 Order.

statements that Congressional intent to reduce treaty-defined rights *may* be derived from surrounding circumstances and legislative history. The Seventh Circuit in this case has held that Congressional intent to extinguish use and occupancy rights, made conditional by treaty, may *not* be taken from surrounding circumstances and legislative history, but *must be express* (700 F.2d at 356, 365). Either we err in assuming that implied abrogation is possible under the "not lightly imputed" and "clear from surrounding circumstances" standards, or the Seventh Circuit's insistence on *express* abrogation conflicts with this Court's standards in such cases as *DeCoteau* and *Rosebud Sioux*.

The court of appeals insists that so-called aboriginal rights can be extinguished by implication, because they are unenforceable and not legal rights at all, 700 F.2d at 356, and that any right mentioned in a treaty, no matter how limited,cannot be extinguished by implication. We reiterate that: 1) this Court has been scrupulous not to abrogate so-called "aboriginal" rights without clear evidence of intent, and 2) cases distinguishing "recognized" from "aboriginal" rights require an element of *permanence* in "recognized" rights. Given the overwhelming evidence of the government's intent, not only to buy the Chippewa's lands, but to remove the Chippewa from Wisconsin within one or two generations, it cannot seriously be argued that the conditional use and occupancy rights were ever understood, by either side, to be permanent. The district court was correct in characterizing the conditional rights as "permissive." (*Bouchard* at 1347-48, 1351, A-Ap. 114a-117a, 125a-126a.)

Rights of use *can* be separate from occupancy, but the two are inextricably linked *in this case. See Bouchard* at 1359, A-Ap. 141-142a. Conditional use and occupancy clauses were put into treaties in anticipation that some later event would require the Indians to remove from the lands in question. The *raison d'etre* for the conditional use and occupancy rights here ceased to exist when, in

the 1854 Treaty, the Chippewa secured the government's written promise that they would not have to remove from the reservations authorized by the treaty.

The district court's analysis of the clear intent behind the events of 1837 through 1854 *(Bouchard,* at 1352, 1358-61, A-Ap. 125a-127a, 139a-147a) was correct. For the foregoing reasons and those presented in the Jurisdictional Statement, the appellants request that the Motion to Dismiss or Affirm be denied.

Respectfully submitted,
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